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No. 91-1675

Supreme Court, U.S.
FILED
MAY 15 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

BERNARD A. ZARDA, SR., et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents.

and

JERRY S. DEAN, et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents.

Petition For Writs Of Certiorari To The Supreme Court Of The State Of Kansas

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION FILED BY THE KANSAS DEPARTMENT OF REVENUE

Kenton C. Granger*
Raymond H. Dahlberg
Niewald, Waldeck & Brown, P.C.
1200 Main Street, Suite 4100
Kansas City, MO 64105
(816) 471-7000

** Counsel of Record*

James Ungerer
9701 West 121st Terrace
Overland Park, KS 66213
(913) 897-4634

William L. Mitchell
Mitchell & Henry
119 West Sherman
Hutchinson, KS 67504
(316) 665-5211

John C. Frieden
Kevin M. Fowler
Frieden, Haynes & Forbes
400 S.W. 8th, Suite 409
Topeka, KS 66603
(913) 232-7266

Counsel For Petitioners

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OR CALL COLLECT (402) 342-2831

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION FILED BY THE KANSAS DEPARTMENT OF REVENUE

One critical misrepresentation is contained at pages 6 and 10 of Respondents' Brief In Opposition filed on behalf of the Kansas Department of Revenue.[1] At page 6 the Kansas Department of Revenue states:

> "The Kansas rules of civil procedure and evidence are applicable to procedures before the state board of tax appeals." (Footnote reference is made to Kan. Adm. Reg. 94-22-10.)

Respondents, however, did not provide a copy of Kan. Adm. Reg. 94-2-10 to assist the Court. Therefore, Petitioners, by Appendix J hereto, submit that regulation for the Court's consideration.

It can be seen that the *only* reference in Kan. Adm. Reg. 94-2-10 is contained in sub-paragraph (c), which reads as follows:

> "**The rules of evidence** as set forth within the code of civil procedure of this state, and particularly **Article 4, Chapter 60, Kansas Statutes Annotated, may** be followed by the board in its proceedings; however, the **rules of evidence**

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[1] At this time it is not clear to Petitioners whether additional responses will be filed on behalf of other Respondents. However, since Supreme Court Rule 15.5 indicates that the entire matter may be submitted to the Court upon receipt of Respondents' brief, Petitioners hesitate to wait in filing this Reply. Additional replies may be forthcoming if deemed appropriate when additional Respondents' briefs in opposition are filed.

> may be modified if it will be in the public interest to do so and will aid in ascertaining the facts. In all cases the rules of civil procedure shall not be used in a highly technical manner and all parties shall remain aware that proceedings before the board are administrative proceedings and not proceedings before a district court of this state." (Emphasis added.)

Article 4 of the Kansas Statutes Annotated specifically relates to the Kansas rules of ***evidence*** only. The class action procedures are contained in Article 2.[2] Therefore, the Respondents' brief is in error and critically misleading. Indeed, throughout these proceedings the exact opposite position has been taken by Respondents. Moreover, the Kansas Supreme Court in the *Zarda* and *Dean* opinions had every opportunity to afford Petitioners class action relief before the Board of Tax Appeals, but did not do so. Further, the statement in footnote 4 at page 7 of the Kansas Department of Revenue's brief that numerous tax protests were "spawned" by the Attorney General's Opinion is totally unsupported by the record below.

CONCLUSION

Petitioners urge the Court not to be mislead by the erroneous references at pages of 6 and 10 of the Kansas Department of Revenue's brief. The fact is that *no* class

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[2] See, Appendix E-2 of the *Petition for Writs of Certiorari.*

relief, whatsoever, is available once the taxpayer starts down the tax protest trail. (See, *Petition for Writs of Certioruri* at pages 12 & 13.)

Respectfully submitted,

Kenton C. Granger*
Raymond H. Dahlberg
Niewald, Waldeck & Brown, P.C.
1200 Main Street, Suite 4100
Kansas City, MO 64105
(816) 471-7000

* ***Counsel of Record***

James Ungerer
9701 West 121st Terrace
Overland Park, KS 66213
(913) 897-4634

William L. Mitchell
Mitchell & Henry
119 West Sherman
Hutchinson, KS 67504
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John C. Frieden
Kevin M. Fowler
Frieden, Haynes & Forbes
400 S.W. 8th, Suite 409
Topeka, KS 66603
(913) 232-7266

Counsel For Petitioners

APPENDIX J

KANSAS BOARD OF TAX APPEALS

94-2-10. Hearing procedure. (a) Any party may appear at any hearing or other proceeding before the board and be heard in person or the party may appear and be represented by an attorney who is regularly admitted to practice in the supreme court of the state of Kansas. Any party may be represented by out-of-state counsel if counsel has complied with the rules of the Kansas supreme court relative to the admission of foreign attorneys. An elected or appointed officer of a county, city or other taxing district may appear on behalf of the county, city or taxing district, except where a statute or the board prohibits an appearance by an elected or appointed officer and requires the county, city or other taxing district to be represented by an attorney regularly admitted to practice in the supreme court of the state of Kansas. This exception shall not prohibit an elected or appointed officer of a county, city or other taxing district from testifying on behalf of the county, city or other taxing district.

(b) All pre-trial hearings shall be conducted by one or more members of the board. Any rulings made by a board member at any pre-trial conference shall be subject to approval and ratification by the remainder of the board.

(c) In the event of a backlog in the board's docket of cases awaiting hearing, the board may, in its discretion, take evidence in any matter before it by means of a hearing panel consisting of one or more members of the

board. Any decision shall be made by at least three members of the board.

(d) On the date and at the place and time stated in the notice of hearing, the chairperson or the member delegated to preside over the hearing, hereinafter referred to as "presiding member," shall have the docket called. The chairperson or presiding member may make a statement as to the scope and purpose of the hearing at the opening of the hearing. All parties or witnesses who are to testify, except attorneys duly admitted to practice, shall be sworn by the reporter, the secretary of the board or by any member of the board.

(e) The rules of evidence as set forth within the code of civil procedure of this state, and particularly Article 4, Chapter 60, Kansas Statutes Annotated, may be followed by the board in its proceedings; however, the rules of evidence may be modified if it will be in the public interest to do so and will aid in ascertaining the facts. In all cases the rules of civil procedure shall not be used in a highly technical manner and all parties shall remain aware that proceedings before the board are administrative proceedings and not proceedings before a district court of this state.

(f) When objection is made to the admissibility of any evidence before the board or as to the validity of any proceeding before the board, the presiding board member may rule upon the objection immediately or the evidence or procedure may be admitted or permitted subject to a subsequent ruling by the board. The presiding member may exclude inadmissible evidence and may order the presentation of cumulative evidence to be discontinued.

(g) At hearings upon appeals or applications, the applicant or the appellant shall open and close. At hearings initiated by the board, the staff attorney for the board shall open and close or the board may order some noticed and appearing party to present evidence. Witnesses for each party shall be examined in the order determined by that party, orally and under oath. All opposing parties shall be entitled to cross examination. To facilitate the orderly and expeditious conduct of hearings, the presiding member may appoint one of the board's staff attorneys to assist procedurally any individual taxpayer not represented by counsel. Such assistance shall not extend to assisting the taxpayer in presenting the taxpayer's case or advising the taxpayer as to the substantive nature of their case: but shall be confined to procedural assistance.

(h) All proceedings shall be recorded by a court reporter retained by the board for that purpose or other recording device, unless waived by the parties. Any such record shall be the only record of any proceeding before the board, other than the contents of the board's files, evidence admitted by the board and matters administratively noticed by the board. Transcripts of any proceedings before the board may be obtained upon request to the board and upon paying the costs of providing the transcripts.

(i) The use of recording, photographic or television devices during any proceedings before the board are authorized, pursuant to the provisions of K.S.A. 75-4318(e). To insure orderly proceedings in hearings before the board and in order to minimize the detrimental

effects on the testimony of witnesses, cameras, photographic lights and recording devices shall be permitted during the sworn testimony of witnesses only as long as the use of such devices is not disruptive to the witnesses and the proceedings.

(j) Administrative notice of the board's public records and those of any state, local or federal government entity, as well as those universally accepted facts properly cognizable by administrative notice, may be taken by the board in all hearings before it.

(k) The submission of briefs and proposed findings of facts and conclusions of law may be required by the board at the conclusions of any hearing and any party desiring to submit the same may do so in all cases. The time for filing of such documents and any reply briefs shall be fixed by the board at the conclusion of the hearing. The original and six copies of these documents shall be filed with the secretary of the board and copies shall be served on all interested parties. Proof of service shall be filed as required in these rules. (Authorized by K.S.A. 74-2437; implementing 74-2436, 74-2437a, 74-2437b, K.S.A. 1986 Supp. 75-4318; K.S.A. 12-110a, 19-431, K.S.A. 1986 Supp. 79-213, K.S.A. 79-1103 as amended by L. 1987, Ch. 319, Sec. 5, 79-1105a, 79-1409, 79-1413a, K.S.A. 1986 Supp. 79-1478, K.S.A. 1986 Supp. 79-1481, K.S.A. 79-1609, K.S.A. 1986 Supp. 79-1702, K.S.A. 79-1964a, 79-1964b, K.S.A. 1986 Supp. 79-2005, K.S.A. 79-2938, 79-2939, 79-2941, 79-2951, 79-5013, 79-5016, K.S.A. 1986 Supp. 79-5033; effective May 1, 1981; amended May 1, 1987; amended May 1, 1988.)